Allegany Aggregates, Inc. *and* International Union of Operating Engineers Local No. 37, AFL-CIO, Petitioner. Case 5-RC-14460

February 18, 1999

DECISION, ORDER, AND DIRECTION

BY MEMBERS FOX, HURTGEN, AND BRAME

The National Labor Relations Board, by a three-member panel, has considered objections to an election conducted on May 29, 1997, and determinative challenged ballots therein and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Decision and Direction of Election issued by the Regional Director on April 30.2 The tally of ballots shows 10 ballots cast for and 11 against the Petitioner, with 5 determinative challenged ballots.3

The Board has reviewed the hearing officer's findings in light of the exceptions and brief, and has decided to adopt the hearing officer's findings⁴ and recommendations only to the extent consistent herewith.⁵

For the reasons set forth below, we overrule the Petitioner's objections to the election, and we reject the hearing officer's recommendation to sustain the challenge to the ballot of "floater" David Miller.

Since 1991, the Employer has operated two limestone quarries, where it blasts and cuts rock from mountainsides and crushes it to government and customer specification. The Bedrock quarry is in Flintstone, Maryland, and the Short Gap quarry is a relatively short distance

Member Hurtgen dissents with respect to the conclusion that employee Readd is eligible to vote. He would apply the test of whether Readd has a reasonable expectation of returning to work in the unit. That issue was not resolved by the hearing officer, and Member Hurtgen would therefore remand this issue. Without now resolving it, Member Hurtgen notes that: Readd has been out of work on disability since December 1995. Although he returned to work for 3 days in March 1996, his disability prevented him from continuing to work. From March 1996 through the date of the hearing here, Readd had not worked at all, and there had been no determination by a physician or reviewing authority whether he would ever return to the job.

away in Short Gap, West Virginia. The Employer employs approximately 29 people at both sites, of whom 7 or 8 are supervisors, dispatchers, and office clericals, and are excluded from the production and maintenance unit. The remaining employees at each location are quality control employees, equipment operators, and maintenance personnel, all of whom are included in the unit.

The Objections

1. The hearing officer found that the Employer engaged in objectionable conduct when, several weeks before the election, it placed a coffeemaker and a water cooler for use by employees in a trailer located near the crusher shed at its Bedrock quarry. The hearing officer reasoned that this conduct constituted an objectionable "sweetening" of an existing benefit because it gave employees significantly greater access to coffee and water than they had previously had. We disagree.

The record reflects that the employees have always had access to a coffeepot and water cooler maintained by the Employer in a building at the quarry referred to as "the House," where unit employees report daily to punch their timecards and turn in mechanical reports. Although the House is located further from where the employees work than the trailer where the new coffeepot and water cooler were set up in March, employees testified at the hearing that if they wanted water or coffee while they were working, they could ask a supervisor and the supervisor would get it for them from the House. In addition, Supervisor Tony Flanagan often brought coffee packets from the House to make coffee for himself and other employees in a coffeemaker belonging to unit employee Terry Whorton which was set up in the crusher shed.

The evidence establishes that the Employer set up the trailer to house electrical equipment for a new above-ground fuel tank and to provide office space for Flanagan and another supervisor who had been sharing office space at the House, and that the coffeepot was installed to accommodate the supervisors and to replace Whorton's coffeemaker, which had been removed from the crusher shed. The water cooler was installed to provide water for use in making coffee, because the trailer has no running water. Although employees are permitted to use the coffeepot and water cooler, the Petitioner's witnesses testified at the hearing that they had not used it regularly and indeed, that only one pot of coffee had been made since the new coffeepot was installed. Under these cir-

¹ Except where specifically stated otherwise, all dates are in 1997.

² On May 28, the Board issued an order denying the Employer's request for review of the Decision and Direction of Election in all respects, except for the Regional Director's exclusion of the dispatchers and the floater, whom the Board directed to be permitted to vote subject to challenge.

³ The Petitioner withdrew its challenge to the ballot of employee William Weaver, leaving four challenged ballots for determination.

⁴ The Employer has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). We find no basis for reversing the findings.

⁵ For the reasons stated by the Regional Director in his Decision and Direction of Election, with which the hearing officer agreed, we adopt the hearing officer's recommendation to sustain the challenges to the ballots of the dispatchers, Paul McFarland and Jackie Hansel. Further, for the reasons stated by the hearing officer, we adopt his recommendation to overrule the challenge to the ballot of Ralph Readd who was out of work because of a work-related injury at all relevant times.

⁶ The House is a building in which the Employer's vice president, superintendent, dispatcher, clericals, and quality control "technician" have offices or work areas.

⁷ Although Whorton's coffeemaker was removed from the crusher shed in December 1996, it is not disputed that the Employer had it taken out because a safety inspector had cited it as not being properly grounded. There is no evidence that the employees complained about the removal of the coffee pot or that the Employer's installation of the new one was in response to employee requests.

cumstances, we do not regard the placement of the coffeepot and water cooler in the trailer as the granting of a benefit or the enhancement of a benefit tending to influence the outcome of the election.⁸

2. The hearing officer also found that the Employer interfered with employees' free choice by announcing, during the critical period, that the employees were entitled to minimum "show up" pay for reporting to work. The hearing officer concluded that such a policy had not existed immediately before the critical period and that the announcement therefore constituted institution of a new benefit (or at least reinstitution of a benefit that had existed in 1993, when the employees were under a union contract). The hearing officer relied on certain documentary evidence in finding differences between the policy in effect immediately before the critical period and the policy the Employer was supposedly announcing. He also concluded, on the basis of the omission of showup pay on a list of benefits distributed a day after the election, that the preelection statements about showup pay were not accurate descriptions of an existing benefit but simply statements made to affect the election. For the following reasons we disagree.

Witnesses for both the Employer and the Petitioner gave various descriptions of what they conceived "showup pay" to be and what employees were told about it, and the hearing officer found that "the Petitioner's witnesses are generally not reliable about specific statements made by the Employer's witnesses" on this subject. Although the hearing officer also perceived fatal inconsistencies in the evidence offered by the Employer, the record shows that the Employer's witnesses testified consistently that, under the showup pay policy as it had existed continuously since 1993, although employees were guaranteed a minimum of 2 hours' pay for reporting for work, they in fact did not receive this pay without performing work if there was work to be done. According to these witnesses, even when the quarry was not fully operational—once when there had been a fire and once when equipment had been stolen-employees were assigned work if there was any available. Thus, contrary to the hearing officer, the documentary evidence that an employee was paid 2 hours' pay in 1993, without an indication that he had actually performed work, and that in 1997 an employee worked 2 hours for his pay, does not necessarily reflect two different policies. It shows only that on one day there was work to be done and on the other there was not. Nor do we agree with the hearing officer that the absence of any reference to an "employee working" in the "written policy" reflected in Employer's Exhibit 20 (a provision of a collective-bargaining agreement in effect in 1993–1994) is inconsistent with assigning work to employees in connection with the 2-hour guarantee. While the policy assures that employees who have not been instructed to stay home will receive at least 2 hours' pay if they report, it does not negate the Employer's right to assign work to such employees.

Finally, we disagree that the omission of showup pay from a list of benefits distributed by the Employer after the election demonstrates that the preelection statement described a nonexistent benefit. Tuition reimbursement, which the hearing officer specifically found was an existing benefit that employees were similarly informed or reminded of during the critical period, does not appear on the list, so the list was evidently not exhaustive.

In sum, when agents of the Employer advised employees during the critical period that a showup pay policy was still in effect, they were not announcing a new benefit, and the Petitioner thus failed to establish that the Employer's comments on the policy constituted objectionable conduct.

The Remaining Challenged Ballot

The hearing officer reviewed the Decision and Direction of Election and summarily adopted the Regional Director's conclusion that Miller "does not share a community of interest that requires his inclusion in the same bargaining unit as production employees." We find that the record supports Miller's inclusion in the unit.

The Employer's vice president, Robert Smith, testified that Miller was hired in September 1996 to work as a "floater," i.e., to work in whatever capacity he may be needed at a given time. In fact, the record establishes that Miller had some prior experience and that he is trained and performs numerous unit jobs, on an asneeded basis, from dispatching to quality control testing to operating heavy equipment. Further, unit employee Gary Stallings testified that Miller ran the R-50, a piece of heavy equipment, for 2 weeks in September or October 1996 at the Short Gap quarry. Employee Coledo Long's testimony verifies that Miller operated the R-50. Most significantly, Miller performs or helps perform gradation tests on rock samples that quality control employees William Weaver and Gary Smith are required by

⁸ Cf. *Kinney Drugs, Inc.*, 314 NLRB 296, 300 (1994) (restoration of access to coffee flowed directly from the employer's solicitation of grievances). In *Amwood Homes*, 243 NLRB 1006 (1979), cited by the hearing officer, the employer engaged in conduct found to be objectionable when it "sweetened the pot" by significantly increasing the employees' bonus. The substantial pecuniary benefit in *Amwood Homes* is patently distinguishable from the alleged benefit in issue here.

⁹ Although the hearing officer stated that he "must resolve credibility against the Employer" on the showup pay issue, he also stated that in doing so he was relying on "the considerations discussed above," which were his perceptions of conflicts with documentary evidence. As we explain below, there are no such conflicts.

¹⁰ That provision (art. VIII, sec. 2) reads as follows:

Émployees who report to work as instructed by the Company or are recalled to work after they have left the premises are entitled to a minimum of two (2) hours pay; provided that the Company may notify employees by telephone not to report, and any employees so notified shall not receive reporting pay.

An employer witness testified that although the unit was no longer represented by a union, the Employer still abided by the showup pay policy.

law to perform 12 to 15 times a day, and he signs off on quality control paperwork. The tests entail working with unit employees operating heavy equipment out in the quarry in order to dig out several core samples from each of the stock piles there. Although there is little time for conversation, according to Long, Miller likewise must interact with the "pugmill" operator to collect the samples required to determine that the limestone meets content and moisture specifications for use in concrete. At the time of the election, Miller was awaiting results of the certification tests he took to be a quality control technician.¹¹

Miller also regularly performs unit work when he "runs parts" for the repair and upkeep of quarry machinery. Miller uses a common desk in the scale area that employees performing maintenance use. He also works in the testing area located in the basement of the house, where the quality control technician works. In addition to the foregoing, Long testified that Miller delivers his lunch on a daily basis when Long is operating quarry

machines. We note that Miller is salaried, but that his salary is not significantly different from the hourly wage rates paid to unit employees.

Although Miller also performs dispatching duties, the foregoing substantiates the Employer's contention that Miller spends a significant amount of time performing unit work. On the basis of the foregoing, we find that the floater position should be included in the unit, and we overrule the challenge to Miller's ballot.

ORDER AND DIRECTION

The National Labor Relations Board orders that the Petitioner objections to the election are overruled. It is further directed that the Regional Director for Region 5 shall, within 14 days from the date of this decision, open and count the ballots of William Weaver, Ralph Readd, and David Miller. The Regional Director shall then serve on the parties a revised tally of ballots and issue the appropriate certification.

IT IS FURTHER ORDERED that this matter is remanded to the Regional Director for Region 5 for action consistent with this Order and Direction.

¹¹ Quality control technicians were previously determined not to be technical employees and are included in the unit.